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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1955

SAM D. RAWSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 21, 1955.

CITATIONS TO OPINIONS BELOW

The oral opinions of the District Court dated December 22, 1952, and September 28, 1954, are unreported but were printed in the record for the use of the court below at page 16 and 42, respectively. R. 16, 42. Nine

copies of said record have been filed pursuant to Rule 21(4). The opinion of the Court of Appeals (R. 73) is as yet unreported and is printed in Appendix B, *infra*, p. 30.

JURISDICTION

The judgment of the Circuit Court of Appeals was dated and entered on September 21, 1955. R. 79. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether land reacquired by the United States under the authority of the Emergency Appropriation Act of 1935, 49 Stat. 115, and the Act of August 24, 1935, Ch. 641, sec. 55, 49 Stat. 750, 781, is open to mineral entry under the mining laws of the United States.

2. Whether land withdrawn from entry by virtue of and pursuant to the Pickett Act, 43 U.S.C., Sections 141-143, remains open to mineral entry.

3. Whether Executive Order No. 7672 provided that the tract of land here involved should be open to mineral entry, and if so, the President's power to issue such an order.

4. Whether the tract of land here involved was open to mineral entry.

STATUTES INVOLVED

The statutory provisions and executive orders involved are as follows:

1. Emergency Relief Appropriation Act of 1935, Ch. 48, sec. 5, 49 Stat. 115, 118.

2. The Act of August 24, 1935, Ch. 641, sec. 55, 49 Stat. 750, 781.

3. Pickett Act, Act of June 25, 1910, Ch. 421, sec. 1, 36 Stat. 847, amended by Act of Aug. 24, 1912, Ch. 369, 37 Stat. 497, 43 U.S.C., Sections 141-143.

4. Executive Order No. 7672, July 19, 1937, 2 F.R. 1511.

5. R.S. sec. 2319, Feb. 25, 1910, Ch. 85, sec. 1, 41 Stat. 437; 30 U.S.C., Section 22.

6. Bankhead-Jones Farm Tenant Act of July 22, 1937, Ch. 517, secs. 31 and 32, 50 Stat. 522 as amended by the Act of July 28, 1942, Ch. 521, 56 State. 725; 7 U.S.C., Sections 1010 and 1011.

7. Executive Order No. 7908, June 9, 1938, 3 F.R. 1389.

8. Executive Order No. 8531, Aug. 31, 1940, 5 F.R. 3539.

9. Sec. 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, 5 U.S.C., Section 133y-16.

10. Reorganization Act of 1945, Ch. 582, sec. 9, 59 Stat. 613, 617; 5 U.S.C., Section 133y-7(a)(1) and (2).

The pertinent texts of said statutes and executive orders are printed in Appendix A, *infra*, pp. 19-29.

STATEMENT

Petitioner located a mining claim in Jefferson County, Oregon, upon land owned by the United States. R. 6. On March 5, 1952, the United States filed this action in

the United States District Court for the District of Oregon against him, claiming that his location was null and void and praying that he be enjoined from going on the claim and removing material therefrom, and for judgment for the value of the material removed.

The District Court had jurisdiction by virtue of the fact that the United States was the party plaintiff: 28 U.S.C., Section 1345. Pre-Trial Order, R. 3. The action was tried before Solomon, J., who after entering findings of fact and conclusions of law, entered a judgment thereon declaring appellant's mining claim null and void and granting the relief prayed for by the United States. R. 20, 47.

The land upon which the claim was located was purchased by the United States in 1937 with money appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. R. 4-5. Prior to purchase, however, Congress had made further provisions as to such purchases by the Act of August 24, 1935, Ch. 641, sec. 55, 49 Stat. 750, 781. In the District Court it was an agreed fact that:

> "The President had authority under said Emergency Relief Appropriations Act of 1935 and under the act of August 24, 1935, (49 Stat. 115) to make disposition of all of said lands including Section 13 as was made by said Executive Order (No. 7672)." (Insertion added) R. 9.

On July 19, 1937, and soon after this land was purchased, the President isued Executive Order No. 7672, which withdrew a great many parcels of land for the use of the Department of Agriculture. The land upon

which petitioner had located was listed by legal description in the order. The order, however, provided that "nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the land under the applicable laws". This order had not been revoked and was in effect when the appellant located his claim in 1951.

Executive Order No. 7672 recites that it was issued "by virtue of and pursuant to the authority vested in me by the Act of June 25, 1910, Ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, Ch. 369, 37 Stat. 497." This law is popularly known as the Pickett Act and is now codified as 43 U.S.C., Sections 141-143. 43 U.S.C., Section 142, provides that all lands withdrawn under these sections "shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States."

The United States contended in the District Court that appellant's mining claim was null and void simply because it was on "acquired" land, i.e., land which had once been patented by the United States and afterwards bought back. Contentions VI, VII, VIII and X of the United States. R. 10.

The District Court agreed and entered two conclusions of law which stated:

"IV.

"Such 20 acre tract is not in the public domain but is acquired land not subject to mineral entry.

V.

"Defendant's mining claim is null and void." R. 22.

The entry of those conclusions of law together with the judgment based thereon were the principal errors specified by the petitioner in Court of Appeals. The Court of Appeals affirmed the judgment of the District Court, holding that neither 30 U.S.C., Section 22, nor Executive Order No. 7672 sustained appellant's right to locate his claim. R. 79, 73-78; *infra*, p. 37.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important question of federal law which has not, but should be, settled by this Court. That question is: Do the mining laws of the United States apply to land once patented and afterwards reacquired by the United States?

This question is of importance because of the vast amount of land involved. The United States has reacquired by purchase 46,275,218.4 acres of land. For a comprehensive discussion, see Senate Document No. 32, 84th Congress, 1st Session, p. 9.

The Court of Appeals has laid down a broad rule which will apply to all of this land and affect its disposition, not only under the mining laws, but under the great many other statutes dealing with public land:

> "It may be stated as a universal proposition that patented lands reacquired by the United States are not by the mere force of acquisition restored to the public domain." Opinion, R. 77, *infra*, p. 35.

The decision of this case is then of great importance to the proper administration of the public land laws in general, and the mining laws of the United States in

particular. Each monthly issue of the Federal Register under the heading "Land Management Bureau" lists numerous orders affecting the status of government-owned land demonstrating that the administration of the government-owned land is a subject of continuing importance. See also Senate Document No. 32, 84th Congress, 1st Session.

So far as counsel could discover, the question of the applicability of the mining laws of the United States to reacquired land has never been passed upon by any other court except in the District Court below. The mining laws simply provided that "lands belonging to the United States" shall be open to entry. R.S. sec. 2319; Feb. 25, 1920, Ch. 85, sec. 1, 41 Stat. 437; 30 U.S.C., Section 22. The Court of Appeals in holding the reacquired land was not open to mineral entry, decided a case of the first impression and reviewed the prior history of the phrase. The phrase "lands belonging to the United States" comes directly from the basic mining law: the Act of May 10, 1872, Ch. 152, sec. 1, 17 Stat. 91. The Act of May 10, 1872, was preceded by the Act of July 26, 1866, Ch. 262, sec. 1, 14 Stat. 251.

Section 1 of the Act of 1866 is closely similar in wording to Section 1 of the Act of 1872 and hence to 30 U.S.C., Section 22. However there is one significant change: The Act of 1866 used the phrase: "mineral lands of the public domain * * *". In the Act of 1872 this phrase was discarded and replaced with: "all valuable mineral deposits in lands belonging to the United States * * *". The Court of Appeals relied upon a general statement of Representative Sargent who had

charge of the 1872 bill in the House that the bill did "not make any important changes in the mining laws as they have heretofore existed". Cong. Globe, 42nd Congress, 2nd Sess., p. 534; Opinion R. 74, *infra*, p. 32.

However, it is then clear that the Act of 1872, 17 Stat. 91, at least clarified the wording by dropping the ambiguous phrase "public domain" and substituted the more precise phrase "lands belonging to the United States". Since Representative Sargent states no change of meaning was intended, it seems clear that the phrase "public domain" as used in the Act of 1866, 14 Stat. 251, meant "lands belonging to the United States."

Normally the legislative history of an Act as old as the Act of 1872, 17 Stat. 91, would not be significant because its construction would have been settled; but here there has been no case decided involving entry of reacquired lands under the mining laws of the United States. *Oklahoma v. Texas*, 258 U.S. 574, 599-600 (1922), quoted from by the Court of Appeals, does not involve reacquired land. Opinion, R. 74, *infra*, p. 32.

Newhall v. Sanger, 92 U.S. 761, 763, does not construe the mining laws and the general principle announced therein that "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws" is not helpful here. This statement leaves undecided the very question for decision here: Are reacquired lands "subject to sale or disposal under the general land laws", in this instance, the mining laws of the United States?

There are also general statements by this Court which would suggest a different result. For example:

> "Public lands belonging to the United States for whose sale or other disposition Congress has made provision by its general laws are to be legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either express or implied." *Lockhart v. Johnson,* 181 U.S. 516, 520.

At the time Congress passed the Act of 1872, 17 Stat. 91, one case involving reacquired land had been decided under the provisions of the prior Act of 1866, 14 Stat. 251. The case, *Verdier v. Railroad Company,* 15 South Carolina 476, arose under the highway grant section of that act, rather than under the mining law section. However, the case is squarely in point on the question whether a federal land statute applies to reacquired land. In that case the United States acquired title under a tax statute: Act of June 7, 1862, Ch. 98, 12 Stat. 422, 423. The land had been previously privately owned. *Verdier,* p. 478. The Court held that this land was "public land" granted under the Act of 1866, saying:

> "It is true that these lands, having been previously granted and owned as private property, were not original public lands like those unsettled in the new states and territories, but we suppose that after the United States acquired the title they were held for the benefit of all the citizens of the government and were 'public lands' in the sense of the Act of Congress." (p. 480).

The Verdier case, although discussed in petitioner's briefs, is not cited in the opinion of the Court of Appeals.

On other occasions Congress, itself, has impliedly construed the general land laws as applying to reacquired lands. In 1916 Congress desired to obtain a section of land owned by the State of Dakota. Congress felt it necessary to provide that the section thereby obtained from the State of North Dakota:

> "shall not be subject to settlement, location, entry or selection under the public-land laws, but shall be reserved for the use of the Department of Agriculture in carrying on experiments in dry-land agriculture at the Northern Great Plains Field Station, Mandan, North Dakota." Act of July 3, 1916, Ch. 219, 39 Stat. 344, 43 U.S.C., sec. 153.

Recently Congress has again used the phrase "lands belonging to the United States" in legislation relating to mining. From the way the phrase is used in the Atomic Energy Act of 1954, 68 Stat. 919, 934; 42 U.S.C., Section 2097, it is clear that Congress meant to cover thereby acquired land. For example, wild life refuges are expressly included, yet they may consist of acquired land. Act of Feb. 18, 1929, c. 257, Sec. 5, 45 Stat. 1222; 16 U.S.C, Section 715d. See also *Jefferson County*, 24 F. Supp. 390 (E.D. and S.D. Idaho), and *Bailey v. Holland*, 126 F. 2d 317 (C.A. 5), cases involving land purchased or taken for this purpose.

There is no basis in Congress' use of the phrase "lands belonging to the United States" in 30 U.S.C., Section 22, for concluding that reacquired lands are not included therein. As will be pointed out in detail hereafter, the question of whether or not any particular land is open to mineral entry would then depend upon the type of withdrawal order issued by the President. 40 Op. A.G.

73. The President is in a better position than the courts to decide whether or not mineral entry is appropriate. Yet the decision of the Court of Appeals places the question whether or not land is open to entry upon the purely legalistic basis of the nature of its acquistion. The mining laws of the United States do not require such a result.

2. A second federal question of importance which has not been decided by this court, but should be, is also involved. The land in question here was legally described in Executive Order No. 7672. This order described land in 14 townships in Oregon comprising approximately 181,100 acres of land. This executive order was part of a series of such executive orders applying to various western states. The orders may be tabulated as follows:

Executive Order No.	Date of Order	State	No. of Townships Listed Therein	Federal Register Reference
7616	May 13, 1937	Wyoming	4	2 F.R. 997
7662	July 17, 1937	Arkansas	10	2 F.R. 1497
7669	July 19, 1937	Colorado	19	2 F.R. 1509
7670	July 19, 1937	Arkansas	7	2 F.R. 1509
7671	July 19, 1937	South Dakota	3	2 F.R. 1510
*7672	July 19, 1937	Oregon	14	2 F.R. 1511
7673	July 19, 1937	North Dakota	26	2 F.R. 1512
7674	July 19, 1937	North Dakota	54	2 F.R. 1512
7675	July 21, 1937	New Mexico	14	2 F.R. 1535
7677	July 27, 1937	Colorado	20	2 F.R. 1581
7693	Aug. 19, 1937	Washington	34	2 F.R. 1713
7734	Nov. 1, 1937	New Mexico	12	2 F.R. 2803
7760	Dec. 3, 1937	Nebraska	32	2 F.R. 3107

*Order here involved.

Each of the above listed orders is identical in general form with the executive order here particularly involved.

Each order lists land in the stated number of townships but may or may not include the whole township in each case. The amount of acreage involved is large. For example, Executive Order No. 7674 covers approximately 411,740 acres in North Dakota while Executive Order No. 7669 covers approximately 262,600 acres in Colorado.

The executive order in question, as were all the other listed executive orders, was issued in express reliance upon the Act of June 25, 1910, Ch. 421, 36 Stat. 847, as amended by the Act of August 24, 1912, Ch. 369, 37 Stat. 497, commonly known as the Pickett Act and now codified as 43 U.S.C., Section 141-143. 43 U.S.C., Section 142 provides:

> "All lands withdrawn under the provisions of this and the preceding section shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States * * *"

Many other withdrawal orders other than those heretofore listed have also been issued in express reliance upon this act. See 40 Op. A.G. 73. 82.

This opinion of the Attorney-Generl, after reviewing the many instances and types of withdrawal orders, stated the following rule for the guidance of the various administrative agencies concerned: if the withdrawal order was issued under the President's inherent powers, the land remained open for mineral entry; if the President chose to act under the Pickett Act, he acted subject to its disabilities, and the land remained open to mineral entry. 40 Op. A.G. 73, 81.

Here the President chose to act under the Pickett Act, but the opinion of the Court of Appeals discusses neither the Pickett Act nor the opinion of the Attorney General summarizing the long-standing administrative practice. The Court, nevertheless, held that the land here involved was not open to mineral entry.

Although the President acted in express reliance upon the Pickett Act in issuing the listed executive orders, he was also careful to insert in each order the following proviso:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing or patenting the mineral resources of the lands under the applicable laws."

The question of the construction and effect of this proviso is important since it affects hundreds of thousands of acres of government land in may states. The petitioner has contended and now contends that the mining laws of the United States were "applicable laws" referred to by the proviso in the executive order continuing mineral entry in view of the fact that the order was issued under the Pickett Act.

There is no question that the land upon which the claim was located is legally described in the order. The claim was located on the West Half (W½) of the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of Section 13, T. 11 S., R. 12 E. of the Willamette Meridian, Oregon. The order lists:

> "T. 11 S., R. 12 E.,
> * * *
> Sec. 13, all," R. 4, 6.

It has been the government's consistent position that this land in Section 13 was in the Central Oregon Land Project, yet there is no other order placing Section 13 therein if Executive Order No. 7672 does not. It would then seem clear this land in Section 13 was placed in the Central Oregon Land Project subject to the proviso of the order granting the right of mineral entry. Neither the government nor the courts below have recognized the fundamental inconsistency of saying the land is in the project, yet that it is not open to mineral entry.

Since there is no other order placing this land in the Central Oregon Land Project, the President must have intended the phrase "public lands" as used in the order to include Section 13. At the time Executive Order No. 7672 was issued, there was no unpatented public land left in Section 13. R. 32, 45.

Section 1 of the order then had two functions: First and most important, its function was to list all publicly-owned land, including acquired land, withdrawn by Section 2 for the land project. Its second function was to revoke Executive Order No. 6910 so far as it applied to any unpatented public land in the whole publicly-owned area described in Section 1.[1] This theory is confirmed by the fact that the government has not been able

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[1]Unpublished figures furnished by the Department of Agriculture which are not in the record indicate that there were about 13,000 acres of unpatented public land covered by Executive Order No. 7672. The land descriptions in the order describe about 181,100 acres. It would seem clear that the difference between 181,100 acres and 13,000 acres, or about 168,100 acres is reacquired land.

to point to any other order transferring land to the Central Oregon Land Project.

Section 1 of Executive Order No. 7672 then must contain a complete list of all land in the project. Section 2 of the order characterizes all this publicly-owned land as "public lands" and withdraws them for the project subject to the right of mineral entry. The other executive orders heretofore listed have similar problems of construction since each relates to some similar land project. It appears that this series of executive orders set up a series of land projects.

The government has not claimed nor is there any evidence that Executive Order No. 7672 has ever been revoked. Subsequent changes in the agency administering the land have not changed the tracts in the Central Oregon Land Project nor the right to mineral entry based upon Executive Order No. 7672 as to the land described in those tracts. Reorganization Act of 1945, Ch. 582, sec. 9, 59 Stat. 613, 617; 5 U.S.C., sec. 133y-7 (a)(1) and (2). The proviso in the license agreement to the State of Oregon cannot change the wording of the President's order. At the most it is a construction by a subordinate of his intent in issuing his order, but it cannot change the meaning of the order.

3. A third federal question of importance is involved which has not been decided by this Court but should be. The Court of Appeals in its opinion stated:

> "The controlling question in this case is whether land purchased by the United States for a specific purpose is open to location under the general mining laws." Opinion, R. 73, *infra*, p. 30.

The land in question was purchased under the authority of the Emergency Appropriation Act of 1935, 49 Stat. 115, and the Act of August 24, 1935, Ch. 641, sec. 55, 49 Stat. 750, 781. No case involving a mineral entry upon land so purchased has heretofore been decided.

Those statutes did not prescribe any specific use for the land acquired. The President was authorized by the Act of August 24, 1935, to use the appropriated money "for the development of a national program of land conservation and land utilization". 49 Stat. 750, 781. It was further provided that the President could use the money "for the accquisition of submarginal lands and their use for such public purposes as the President shall prescribe". 49 Stat. 750, 781.

Petitioner contends that the President prescribed mineral location as a public purpose for this land when he issued Executive Order No. 7672. Stated differently he regarded mining upon this submarginal lands as appropriate to a national program of "land utilization".

The powers granted the President by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, were even broader. Section 5 thereof provided:

> "In carrying out the provisions of the joint resolution the President is authorized (within the limits of the appropriation made in Secton 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such real property or interest therein."

It was an Agreed Fact in the District Court that:

"The President had authority under said Emer-

gency Relief Appropriation Act of 1935 and under the Act of August 24, 1935, (49 Stat 115) to make the disposition of all of said lands including Section 13 as was made by said Executive Order." R. 9.

The proper construction of these two statutes is of some importance since the Report of the Secretary of Agriculture for 1935, at page 50, while not completely clear, suggests that over 20,000,000 acres were acquired under these two statutes.

To sum up, a writ of certiorari should be granted here because the Court of Appeals has decided several questions of great importance for the administration of the federal mining laws. For the first time it has been held by a court that those laws do not apply to the millions of acres of reacquired land. Second, the decision of the Court of Appeals has the effect of deciding the construction of the Act of August 24, 1935, Ch. 641, 49 Stat. 750, 781, in relation to the mining laws of the United States. Third, the decision below not only construes an executive order which is in the form of many similar executive orders involving hundreds of thousands of acres of land in many states, but the decision contains important implications as to the scope of Presidential powers over the public lands generally, and the reacquired lands in particular.

CONCLUSION

For the foreging reasons, this petition for a writ of certioriari should be granted.

Respectfully submitted,

HOWARD P. ARNEST,
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Attorneys for Petitioner.

APPENDIX A

(STATUTES AND EXECUTIVE ORDERS INVOLVED)

1. Emergency Relief Appropriations Act of 1935, Ch. 48, 49 Stat. 115, 118, provides in part:

> "Sec. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein."

2. The Act of August 24, 1935, Ch. 641, 49 Stat. 750, 781, provides in part:

> "Sec. 55. There is hereby made available, out of any money appropriated by the Emergency Relief Appropriation Act of 1935, such amount as President may allot for the development of a national program of land conservation and land utilization. The sums so allotted may be used, in the discretion and under the direction of the President, for the acquisition of submarginal lands and their use for such public purposes as the President shall prescribe.
>
> "In carrying out the provisions of this section, the President is authorized:
>
> (a) To make contracts and grants; and
>
> (b) To acquire, by purchase, any real property or any interest therein (with or without reservations) in accordance with the policy herein set forth."

3. Pickett Act, Act of June 25, 1910, Ch. 421, sec. 1, 36 Stat. 847, as amended by Act of Aug. 24, 1912, Ch. 369,

37 Stat. 497, 43 U.S.C., Sections 141-143, provides in part:

> Sec. 141: "The President may, at any time in his discretion, temporarily withdraw from settlement, location sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."
>
> Sec. 142: "All lands withdrawn under the provisions of this and the preceding section shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals" * * * (Certain provisos omitted)
>
> Sec. 143: "The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals."

4. Executive Order No. 7672, July 19, 1937, 2 F.R. 1511, provides in part:

> "EXECUTIVE ORDER
> WITHDRAWAL OF PUBLIC LANDS FOR THE USE OF THE DEPARTMENT OF AGRICULTURE
>
> Oregon
>
> By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, it is ordered as follows:
>
> Section 1. Executive Order No. 6910, of November 26, 1934, as amended, temporarily withdrawing certain lands for classification and other

purposes, is hereby revoked so far as it affects any public lands within the following-described area in Oregon:

WILLAMETTE MERIDIAN
(VARIOUS LAND DESCRIPTIONS OMITTED)
T. 11 S., R. 12 E.

* * *

sec. 13, all;

* * *

Section 2. Subject to the conditions expressed in the above-mentioned acts and to all valid existing rights, all vacant, unappropriated, and unreserved public lands within the above-described area are hereby temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion control and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.

Section 3. This order shall be applicable to all lands within the area described in Section 1 hereof upon the cancellation, termination, or release of prior entries, selections, rights, appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation.

Section 4. The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress.

FRANKLIN D. ROOSEVELT

The White House

July 19, 1937

(No. 7672)"

5. R. S. sec. 2319; Feb. 25, 1920, Ch. 85, sec. 1, 41 Stat. 437; 30 U.S.C., Section 221, provides:

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

6. Bankhead-Jones Farm Tenant Act of July 22, 1937, Ch. 517, sec. 31 and 32, 50 Stat. 522, as amended by the Act of July 28, 1942, Ch. 521, 56 Stat. 725; 7 U.S.C., Sections 1010 and 1011, provides:

Sec. 1010. "The Secretary is authorized and directed to develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable streams and protecting the public lands, health, safety and welfare."

Sec. 1011. "To effectuate the program provided for in section 1010, the Secretary is authorized—

(a) To acquire by purchase, gift, or devise, or by transfer from any agency of the United States or from any State, Territory, or political subdivision, submarginal land and land not primarily suitable for cultivation, and interests in and options on such land. Such property may be acquired subject

to any reservations, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property for the purposes of sections 1001 - 1005d, 1007 and 1008 - 1029 of this title.

(b) To protect, improve, develop, and administer any property so acquired and to construct such structures thereon as may be necessary to adapt it to its most beneficial use.

(c) To sell, exchange, lease, or otherwise dispose of, with or without a consideraton, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of Sections 1010-1013 of this title, but any sale, exchange, or grant shall be made only to public authorities and agencies and only on condition that the property is used for public purposes: Provided, however, That an exchange may be made with private owners and with subdivisions or agencies of State governments in any case where the Secretary of Agriculture finds that such exchange would not conflict with the purposes of sections 1001-1005d, 1007 and 1008-1029 of this title, and that the value of the property received in exchange is substantially equal to that of the property conveyed. The Secretary may recommend to the President other Federal, State, or Territorial agencies to administer such property, together with the conditions of use and administration which will best serve the purposes of a land-conservation and land-utilization program, and the President is authorized to transfer such property to such agencies.

(d) With respect to any land, or any interest therein, acquired by, or transferred to the Secretary for the purpose of sections 1010-1013 of this title, to make dedication or grants, in his discretion, for any public purpose, and to grant licenses and easements upon such terms as he deems reasonable.

(e) To cooperate with Federal, State, Territorial, and other public agencies in developing plans

for a program of land conservation and land utilization, to conduct surveys and investigations relating to conditions and factors affecting, and the methods of accomplishing most effectively, the purposes of sections 1010-1013 of this title, and to disseminate information concerning these activities.

(f) To make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired by, or transferred to, the Secretary for the purposes of sections 1010-1013 of this title, in in order to conserve and utilize it or advance the purposes of said sections. Any violation of such rules and regulations shall be punished as prescribed in Section 104 of Title 18."

7. Executive Order No. 7908, June 9, 1938, 3 F.R. 1389, provides:

"EXECUTIVE ORDER

TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF ARGICULTURE FOR USE, ADMINSTRATION AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT.

WHEREAS I find suitable for the purposes of Title II of the Bankhead-Jones Farm Tenant Act, approved July 27, 1937 (50 Stat. 522, 525), and the related provisions of Title IV thereof, all lands of the United States now under the supervision of the Secretary of Agriculture (1) which have been acquired by the Department of Agriculture for use in connection with this land-development and land-utilization projects transferred to it by Executive Order No. 7530 of December 31, 1936, as amended by Executive Order No. 7557 of February 19, 1937 [1]

[1] 2 F.R. 9, 411 (D1).

(including lands transferred to it by the said Executive order, lands thereafter acquired pursuant to the said Executive order, as amended, lands set apart and reserved from the public domain, and lands acquired by transfer from other Federal agencies, whether by Executive order or otherwise), and (2) which are now in process of acquisition by the Department of Agriculture, pursuant to existing contracts of purchase and pending condemnation proceedings, for use in connection with the said projects:

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by section 45 of the said Bankhead-Jones Farm Tenant Act. it is ordered that all the right, title and interest of the United States in the lands so acquired or in process of acquisition, be, and they are hereby, transferred to the Secretary of Agriculture for use, administration, and disposition in accordance with the provisions of Title III of the said Act and the related provisions of Title IV thereof; and immediately upon acquisition of legal title to those lands now in process of acquisition, this order shall become applicable to all the additional right, title, interest thereby acquired by the United States;

Provided, that no lands heretofore set apart and reserved from the public domain shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior;

And Provided further, that this order shall not apply to any of the said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife, waterfowl, migratory bird, or research refuge, or to the right, title, and interest of the United States in the mineral resources of those lands which have heretofore been set apart and reserved from the public domain, and shall not restrict the disposition

of such minerial resources under the public-land laws.

FRANKLIN D. ROOSEVELT

The White House

June 9, 1938

[No. 7908]"

8. Executive Order No. 8531, Aug. 31, 1940, 5 F.R. 3539, provides:

"EXECUTIVE ORDER

AMENDING EXECUTIVE ORDER NO. 7908 OF JUNE 9, 1938, TRANSFERRING CERTAIN LANDS TO THE SECRETARY OF AGRICULTURE FOR USE, ADMINISTRATION, AND DISPOSITION UNDER TITLE III OF THE BANKHEAD-JONES FARM TENANT ACT.

By virtue of the authority vested in me by section 45 of the Bankhead-Jones Farm Tenant Act, approved July 22, 1937 (50 Stat. 522), I hereby amend the two provisos contained in Eexecutive Order No. 7908 [1] of June 9, 1938, transferring certain lands to the Secretary of Agriculture for use, administration and disposition under Title II of the Bankhead-Jones Farm Tenant Act, to read as follows:

'*Provided,* that no lands heretofore or hereafter set apart and reserved from the public domain for use, administration, and disposition in accordance with the provisions of Title III of the said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall be disposed of by sale, exchange, or grant, in accordance with the provisions of said act, without the approval of the Secretary of the Interior, and no transfer of title to such lands shall be complete unless evidenced by patent issued by the General Land Office;

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[1] 3 F.R. 1389.

'*And provided further*, that this order shall not apply to any of said lands which have been, by Executive order or proclamation, included in or reserved as a part of a national forest or of a wildlife, waterfowl, migratory bird, or research refuge, and that after this order, or any order which may hereafter set apart and reserve land from the public domain for use, administration, and disposition in accordance with the provisions of Title III of said Bankhead-Jones Farm Tenant Act and the related provisions of Title IV thereof, shall not apply to the right, title, and interest of the United States in the mineral resources of the lands which have been, or may hereafter be, set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public land laws.'

FRANKLIN D. ROOSEVELT

The White House

Aug. 31st, 1940

(No. 8531)"

9. Sec. 402 of Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099, 5 U.S.C., Sections 133y-16, provides:

"Sec. 402. *Functions relating to mineral deposits in certain lands.*—The functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to the provisions of the Act of March 4, 1917 (39 Stat. 1134, 1150, 16 U.S.C. 520), Title II of the National Industrial Recovery Act of June 16, 1933, (48 Stat. 195, 200, 202, 205, 40 U.S.C. 401, 403 (a) and 408), the 1935 Emergency Relief Appropriations Act of April 8, 1935 (48 Stat. 115, 118), section 55 of Title I of the Act of August 24, 1935 (49 Stat. 750, 781), and the Act of July 22, 1937 (50 Stat. 522, 525, 530), as amended July 28, 1942 (56 Stat. 725, 7 U.S.C. 1011 (c) and 1018), are hereby transferred to the Secretary

of the Interior and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of the Interior as he may designate: *Provided,* That mineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary of Agriculture in order to protect such purposes. The provisions of law governing the crediting and distribution of revenues derived from the said lands shall be applicable to revenues derived in connection with the functions transferred by this section. To the extent necessary in connection with the performance of the functions transferred by this section, the Secretary of the Interior and his representatives shall have access to the title records of the Department of Agriculture relating to the lands affected by this section."

10. The Reorganization Act of 1945, Ch. 582, sec. 9, 59 Stat. 613, 617; 5 U.S.C., Section 133y-7, provided in part:

"(a) (1) Any statute enacted, and any regulation or other action made, prescribed, issued, granted, or performed, in respect of or by any agency or function transferred to, or consolidated or coordinated with, any other agency or function under the provisions of sections 133y and 133y-16 of this title, before the effective date of such transfer, consolidation or coordination, shall, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law, have the same effect as if such transfer, consolidation, or coordination had not been made; but where any such statute, regulation, or other action has vested functions in the agency from which the transfer is made under the plan, such functions shall, insofar as they are

to be exercised after the transfer, be considered as vested in the agency to which the transfer is made under the plan.

"(2) As used in Paragraph (1) of this subsection, the term 'regulation or other action' means any regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation or other action."

(Section (b) is omitted as inapplicable)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAM D. RAWSON, *Appellant,*	)	
vs.	)	No. 14,661
	)	Sep. 21, 1955
UNITED STATES OF AMERICA *Appellee.*	)	

Appeal from the United States District Court for the District of Oregon

BEFORE: STEPHENS, HEALY, and POPE, Circuit Judges

HEALY, Circuit Judge

The controlling question in this case is whether land purchased by the United States for a specific purpose is open to location under the general mining laws. In its complaint in the action the government asked that appellant be enjoined from further occupancy of a mineral claim he had located on government-owned land and from removing volcanic cinders therefrom. Damages were asked on account of materials already extracted. The trial court granted the injunction prayed and awarded damages in a small amount.

The facts are undisputed. In 1915 the Department of the Interior issue to one Stoller a homestead patent to 160 acres of land located in Secs. 13 and 24, Twp. 11 South, Range 12 East of Willamette Meridian, in Oregon. This homesteaded area embraces within its limits

the 20-acre mining claim in question, which latter was located by appellant in 1951. In 1937, long prior to the location, the United States had purchased from the grantee of Stoller the 160-acre tract. The government's purchases apparently included also other privately owned lands in the same sections, in other sections of the Township, and in adjoining Townships. The purpose of the acquisitions was to retire submarginal lands from agricultural use, to prevent soil erosion, to protect watersheds, to conserve wildlife, and other allied purposes. The purchases were made with funds appropriated by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115. In 1938 these acquired lands were by executive order[1] designated for administration by the Secretary of Agriculture under the Bankhead-Jones Tenant Act of July 22, 1937, 50 Stat. 522, 525, as amended by the Act of July 28, 1942, 56 Stat. 725. In 1940 the Department of Agriculture and the Oregon State Highway Commission entered into a fifty-year licensing agreement wherein the Commission was authorized to remove stone, gravel and other materials from the area for use in construction upon or in connection with the property. Following all this, appellant made his placer mining location and proceeded to remove materials therefrom.

Appellant predicates his claim of right to make the mineral location in part upon verbiage of Title 30 USCA §22, enacted in 1872, authorizing mineral entries on "lands belonging to the United States." Prior to this

[1]Executive Order 7908, June 9, 1938, 3 F.R. 1389.

enactment mineral lands were subject to disposition under the Act of July 26, 1866, 14 Stat. 251, which relates to "the mineral lands of the public domain." The legislative history of the 1872 Act affords no grounds for believing that the variance in verbiage from the earlier statute has any present significance. The contrary, indeed, appears to be the case. Representative Sargent who fathered the 1872 bill and was in charge of it in the House said that "the bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands." Cong. Globe, 42nd Congress, 2d Sess., p. 534.

However this may be, debate on the point would appear to be foreclosed by the holding of the Supreme Court in Oklahoma v. Texas, 258 U. S. 574, 599-600 (1922), where the Court, after quoting the relevant provision of the 1872 Act, said: "This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of 'The Public Lands.' To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the

Yellowstone National Park, and the military reservations throughout the western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws."

It is argued that Executive Order No. 7672 issued in July of 1937 (shortly after the government's acquisition of the Stoller land) by its express terms provided that that land was to be subject to mineral entry. Order No. 7672 describes an area including a large part of Township 11, in which that land lies, as well as lands in other Townships in the same general locality. In reference to Sec. 13 of Township 11 it indicates a withdrawal of "all" lands in the section. Omitting the legal description of the parcels affected, the withdrawal order is quoted on the margin.[2]

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[2]"Executive Order
"Withdrawal of Public Lands for the Use of
the Department of Agriculture
"Oregon

"By virtue of and pursuant to the authority vested in me by the act of June 25, 1910, ch. 421, 36 Stat. 847, as amended by the act of August 24, 1912, ch. 369, 37 Stat. 497, it is ordered as follows:

"Section 1. Executive Order No. 6910 of November 26, 1934, as amended, temporarily withdrawing certain lands for classification and other purposes, is hereby revoked so far as it affects *any publice lands* within the following-described area in Oregon:

. . . . [Legal Description.]

"Section 2. Subject to the conditions expressed in the above-mentioned acts and to all valid existing rights, *all vacant, unappropriated, and unreserved public lands within the above-de-*

The essential thing to note is that in the caption and throughout the Order the withdrawal related solely to the "public lands." As stated in Section 1 hereof, it affects "any public lands" within the described area. Section 2 withdraws "all vacant, unappropriated, and unreserved public lands within the above-described area." The proviso at the close of Section 2, permitting prospecting and the location and exploitation of mineral lands, obviously has reference only to the pursuit of those activities on such of the lands as were public lands. Under the land laws mineral entries may be made only on lands forming part of the public domain, that is, public lands of the United States subject to entry, sale,

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scribed area are hereby temporarily withdrawn from settlement, location, sale, or entry, and reserved and set apart for use and development by the Department of Agriculture for soil erosion and other land utilization activities in connection with the Central Oregon Land Project, LA-OR 2: *Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.*

"Section 3. This order shall be applicable to all land within the area described in Section 1 hereof upon the cancellation, termination, or release of prior entries, selections, rights, appropriations, or claims, or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation.

"Section 4. The reservation made by Section 2 of this order shall remain in force until revoked by the President or by act of Congress. [Emphasis ours.]

"Franklin D. Roosevelt

"The White House
July 19, 1937"

"[No. 7672]"

["F.R. Doc. 37-2273; Filed, July 20, 1937; 2:50 p.m.]"

or other disposal pursuant to general law.[3] Cf. Newhall v. Sanger, 92 U. S. 761, 763; United States v. Holliday, 24 F. Supp. 112; and compare Oklahoma v. Texas, supra. The Stoller tract, purchased by the government for prescribed uses, does not fall within the category of public land. It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, such as parks, national monuments, and the like—areas which it could not rationally be argued remain open to location and exploitation under the mineral laws. Certainly, an intent can not be imputed the President to throw open to mineral entry acquired land in the area which would not be subject to such entry in the absence of the withdrawal order. Authority in the executive to do that would be absent even if the result were intended.

Traditionally the public lands of the United States have been administered by the Department of the Interior, whereas here, as already noted, the acquired land involved had been authoritatively transferred to the Department of Agriculture for administration by that agency. The placing of these lands under the jurisdiction

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[3]There are exceptions to this principle where the Congress, as in the Stock-Raising Homestead Act of 1916, 43 USCA §291 et seq., has expressly reserved the mineral rights, leaving the lands open to prospecting and mineral location despite the issuance of homestead patents. The Stoller homestead with which we have to do here was not acquired under that Act.

of the latter Department in itself refutes any notion that such lands were subject to the general land or mining laws. By the Bankhead-Jones Act, supra, Sec. 32, Title III, the Secretary of Agriculture had been given broad powers with respect to the disposition of acquired lands. He could "sell, exchange, lease or otherwise dispose of" them, but only to public authorities for public purposes. As already seen, the Secretary did in fact by license extend to the Oregon Highway Commission for a fifty-year period the right to remove materials such as volcanic cinders from the very deposit subsequently located upon by appellant. As one would expect, the licensing agreement with the Commission contained a precautionary clause relating back to the proviso in Section 2 of Executive Order No. 7672, already quoted and discussed. The clause reads:

> "It is provided, however, insofar as the land subject to this agreement consists of public domain reserved for use in connection with the project by Executive Order No. 7672, dated July 19, 1937, that nothing in this agreement shall be construed to restrict the disposition of mineral resources contained in such lands under the public land laws of the United States."

By its express terms this provision of the licensing agreement has no relation to acquired lands, but only to lands forming part of the public domain.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Sep. 21, 1955.

Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAM D. RAWSON, Appellant,	)	
vs.	)	No. 14,661.
UNITED STATES OF AMERICA, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and Entered: September 21, 1955

PAUL P. O'BRIEN, Clerk.